Supreme Court, U.S.
FILED
AUG 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-10

In the Supreme Court of the United States

October Term, 1985

UNITED TRANSPORTATION UNION, *et al.*,

Petitioners,

v.

MAINE CENTRAL RAILROAD COMPANY, *et al.*,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTION PRESENTED

Should this Court grant the Petition to determine whether the Court of Appeals erred in its application of the "obviously insubstantial" standard by holding that it was not frivolous for Maine Central Railroad Company to argue that the Agreement between the parties as supplemented by custom and practice arguably granted Maine Central Railroad Company the right to enter into the transaction in question and make necessary job abolishments as a result?

LIST OF PARTIES

The parties to the proceeding below were the Respondents, Maine Central Railroad Company, Portland Terminal Company and Guilford Transportation Industries, Inc.; Respondent Brotherhood of Maintenance of Way Employees and Petitioners, United Transportation Union and various officers of the Union.[1]

The following is a list as required by Rule 28.1 of the Supreme Court Rules of all parent, subsidiary and affiliate corporations of Maine Central Railroad Company, Portland Terminal Company and Guilford Transportation Industries, Inc.

Guilford Transportation Industries, Inc.;
Guilford Motor Express, Inc.;
Guilford Aviation Corporation;
Hudson River Estates, Inc.;
Railstar Control Technology, Inc.;

Maine Central Railroad Company;
Portland Terminal Company;

Boston and Maine Corporation;
Springfield Terminal Railway Company;
Cheshire Bridge Corporation;
The Mystic Terminal Company;
Stony Brook Railroad Corporation;
Northern Railroad;
Vermont and Massachusetts Railroad Company;
North Station Industrial Building, Inc.;
North Station Hotel Building, Inc.;

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[1]The officers of the United Transportation Union involved in this action are E. F. Lyden, E. A. Phillips, Harold Erickson, Peter Green, Gregory Kennedy, Gregory Geagen, Leo Higgins, Dominic Maietta and Robert Ash.

Pine Tree Corporation;
Connecticut River Valley Company, Inc.;

Delaware and Hudson Railway Company;
Albany Port Railroad Corporation;
Napierville Junction Railway Co.;
Albany and Vermont Railroad Company;
Greenwich and Johnsonville Railway Company;
Wilkes-Barre Connecting Railroad Company;
Saratoga and Schenectady Railroad Company;
The Northern New York Development Company;
Wyoming Valley Improvement Company.

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The Respondents, Maine Central Railroad Company, Portland Terminal Company and Guilford Transportation Industries, Inc., respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision and judgment of the United States Court of Appeals for the First Circuit rendered on April 9, 1986, reported at 787 F.2d 780.

STATEMENT OF THE CASE

Maine Central Railroad Company ("MeC") operates a railroad in the Northeastern United States and is engaged in the intrastate and interstate transportation of freight.

Portland Terminal Company is a wholly-owned subsidiary of MeC and operates the terminal facilities at Rigby Yard near Portland, Maine through which passes freight traffic in interstate commerce. MeC is a wholly-owned subsidiary of Guilford Transportation Industries, Inc.

A. The Lease Transaction

MeC serves hundreds of customers throughout its system, including major paper mills and related industries in fourteen of Maine's sixteen counties. Boise Cascade Corporation ("Boise"), engaged in the manufacture of paper and paper products, is one of the many customers of MeC. Much of Boise's shipping needs in Maine is handled by MeC, which owns approximately nine miles of track in a yard ("Rumford Yard") adjacent to Boise's paper mill at Rumford, Maine. Members of the United Transportation Union ("UTU") and the Brotherhood of Maintenance of Way Employees ("BMWE") were employed by MeC, respectively, to perform switching operations and to maintain the track at the Rumford Yard.

On October 1, 1985, due to Boise's dissatisfaction with MeC's switching operations, MeC leased the Rumford Yard trackage to Boise, with an option allowing Boise to assume responsibility for the switching and maintenance operations. Thereafter, Boise notified MeC of its intention to exercise the option effective November 13, 1985. MeC notified the UTU and the BMWE of certain job abolishments at the Rumford Yard which would be effective November 13, 1985. Upon learning of the proposed transfer of switching and maintenance responsibilities and of the proposed job abolishments, the UTU threatened to strike both MeC and Portland Terminal Company.

B. Proceedings Below

Faced with a threatened strike, MeC and Portland Terminal Company commenced an action against the UTU and various officers of the UTU by filing, on November 8, 1985, a Verified Complaint for Declaratory and Injunctive Relief seeking to enjoin the UTU from striking. MeC and Portland Terminal Company asserted that the objections of the UTU to the lease and job abolishments gave rise to a "minor" dispute subject to §3 of the Railway Labor Act ("RLA"), 45 U.S.C. §153, over which the UTU cannot lawfully strike.

The UTU filed an Answer and Counterclaim against MeC for injunctive relief. The BMWE filed a Complaint for Injunctive Relief against MeC and Guilford Transportation Industries, Inc. and, without objection, successfully moved to have the two cases consolidated. The UTU and the BMWE sought a so-called "status quo" injunction against MeC on the asserted ground that the lease and job abolishments presented a "major" dispute subject to §6 of the RLA, 45 U.S.C. §156.

On November 12, 1985, the Honorable Judge Gignoux issued a Temporary Restraining Order enjoining the UTU from striking and denied the UTU's and the BMWE's motions for temporary restraining orders. The Court found that MeC and Portland Terminal Company were likely to prevail on their claim that the disputes between the parties arising out of the lease of track from MeC to Boise were minor disputes. Petitioners' Appendix at 2g. By stipulation, the BMWE agreed to be bound by the Temporary Restraining Order. As a result, Boise assumed responsibility for train operations and track maintenance on the leased track by contracting with an independent third party, *viz.*, Traffic Services Co.

On January 9, 1986, the District Court, per the Honorable Judge Carter, heard oral argument on the various motions for permanent injunctions and issued an Order in which it held that the dispute was major within the meaning of the RLA and, therefore, a *status quo* injunction should issue against MeC and no injunction should issue against the UTU and its officers. The District Court reasoned that the labor contract language in question did not serve to authorize or prohibit expressly the lease transaction and the resulting job abolishments. The District Court further rejected, as not being sufficiently parallel to the Boise lease, the three examples of past practice submitted by MeC to establish that previous transactions of this type had been treated by the parties as governed by the existing labor contract. Petitioners' Appendix at 1e-2e. On January 15, 1986, the District Court issued the Permanent Injunction requiring MeC to resume switching and maintenance responsibilities at Rumford Yard with MeC employees. Petitioners' Appendix F. This Order was stayed by the United States Court of Appeals for the First Circuit pending appeal.

On appeal, the First Circuit reversed the District Court. The First Circuit found that the District Court had exceeded its proper role by actually interpreting the parties' agreements, thereby misapplying the "obviously insubstantial" standard as set forth by the First Circuit in *Airline Stewards & Stewardesses Association v. Caribbean Atlantic Airlines, Inc.*, 412 F.2d 289 (1st Cir. 1969). According to *Airline Stewards*, the test to determine if a dispute is major or minor is:

> whether the company's contractual defense was so obviously insubstantial as to be an attempt to circumvent §6 of the Railway Labor Act.

* * *

> It may be that the District Court's interpretation of the contract will ultimately prove to be correct. But in deciding whether to assume jurisdiction to grant injunctive relief, the court's task is not to interpret the contract. It is to determine whether the contractual defense is frivolous. Otherwise the arbitration machinery mandated by the Railway Labor Act will be dealt a crippling blow.

Id. at 291.

The Court of Appeals held that the District Court had violated this standard by analyzing and distinguishing the examples of past practice. In effect, the District Court usurped the role of an arbitrator by rendering a decision on the merits rather than applying the "obviously insubstantial" standard. The Court of Appeals went on to hold that the Carter Milling lease was sufficiently parallel to the Boise lease transaction that MeC's defense was not frivolous and, therefore, the dispute was minor and subject to resolution before an arbitrator.

Having concluded that the District Court exceeded its authority in regard to its analysis of the past practice offered by MeC, the First Circuit did not consider MeC's initial contention that its actions were not forbidden by the express language of the contract and, therefore, were permitted as an exercise of management prerogative.

REASONS FOR DENYING THE WRIT

The Court of Appeals fully considered and correctly decided the issues raised below. Petitioners raise four grounds in support of their Petition for Certiorari. None of these arguments warrant granting the Petition.

I. The Court Of Appeals' Decision Is Not In Conflict With This Court's Decision In *Detroit & Toledo Shore Line*

Petitioners argue that the Court of Appeals' decision permitting a single instance of past practice to constitute a working condition between the union and carrier is in direct conflict with this Court's decision in *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142 (1969).

The issue before this Court in *Detroit & Toledo Shore Line* was whether the objective working conditions which must be maintained under the RLA *status quo* requirements included working conditions not set forth in a written agreement. In answering this question in the affirmative, this Court noted that:

> It would be virtually impossible to include all working conditions in a collective bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others.

Id. at 154-55.

The Court further stated that, in order for a condition to be included among the objective working conditions, it must have "occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions." *Id.* at 154.

The Court of Appeals' decision, rather than being in conflict with *Detroit & Toledo Shore Line*, is a proper application of that standard. The question facing the Court of Appeals was whether it was frivolous to argue that the

prior lease transactions proffered by MeC had "occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a party of [the agreement]." The Court of Appeals held that, given the infrequency of lease transactions, it was not "frivolous" to argue that, based on one prior transaction, the objective working conditions include the right of MeC to lease trackage and make necessary job abolishments. The First Circuit's decision does not present a conflict, but rather represents a logical and justifiable application of *Detroit & Toledo Shore Line* to the unique factual circumstances of the case at bar.

II. The Court Of Appeals Correctly Applied The "Obviously Insubstantial" Standard

Petitioners argue that the Court of Appeals' decision has expanded the "obviously insubstantial" standard for determination of minor disputes by permitting a single instance of past practice to support a finding that MeC's argument is not frivolous. To the contrary, this decision follows an unbroken line of authority in the First Circuit establishing the "obviously insubstantial" standard. *See Airline Stewards & Stewardesses Association v. Caribbean Atlantic Airlines*, 412 F.2d 289 (1st Cir. 1969) and *Carbone v. Meserve*, 645 F.2d 96 (1st Cir.) *cert. denied*, 454 U.S. 859 (1981).

Furthermore, the First Circuit decision is consistent with the law of other circuits. For example, in *Railway Express Agency v. Brotherhood of Railway, Airline and Steamship Clerks*, 437 F.2d 388 (5th Cir.), *cert. denied*, 403 U.S. 919 (1971), the carrier asserted the right to make unilateral transfers of work. The agreement between the parties neither permitted nor prohibited the carrier's

action. The carrier argued that there was, however, a history of unilateral transfers of work with no apparent objection from the union. The Fifth Circuit held that the dispute presented was minor since the asserted past practice at least gave the carrier the arguable right to make the unilateral transfer of work. The decision of whether the carrier actually had such a right must be left to the arbitrator. *Id.* at 392.

Similarly, in *Railway Labor Executives Association v. Atchison, Topeka & Sante Fe Railway Co.*, 430 F.2d 994 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971), the Adjustment Board was held to have jurisdiction to adjudicate a claim notwithstanding the fact that nothing in the agreement applied to this situation. The carrier had filed with the Interstate Commerce Commission ("ICC") a statement of its intention to discontinue service on two trains. Upon receiving notification from the ICC that it would not oppose the discontinuance and twenty days prior to the date stated in the posted notices, the carrier discontinued service.

The union, while admitting that the dispute was minor, brought what it characterized as a tort claim for the violation of a statutory duty imposed by the Interstate Commerce Act. The court held that, while there was no express language covering this situation in the contract, the question of "whether such a provision was omitted because the parties relied on the language of the Interstate Commerce Act, the 'usage, custom and practice' of the industry or whether it was rejected following negotiation" is a question requiring the expertise of the Adjustment Board. *Id.* at 996.

Even if, as Petitioners argue, this decision does expand the "obviously insubstantial" standard, Petitioners

have not asserted any reason why such an expansion is unwarranted or inconsistent with the Court of Appeals' prior decisions, with other Courts of Appeals' decisions or with any of this Court's decisions.

III. The Court of Appeals' Decision is Not in Conflict With the Tenth Circuit's Decision in *St. Louis Southwestern Railway Co. v. Brotherhood of Railroad Signalmen*

Petitioners argue that certiorari should be granted because the Court of Appeals' decision is in conflict with the Tenth Circuit's decision in *St. Louis Southwestern Railway Co. v. Brotherhood of Railroad Signalmen*, 665 F.2d 987 (10th Cir. 1981), *cert. denied*, 456 U.S. 945 (1982) *("Cotton Belt")*. *Cotton Belt*, however, is distinguishable on its facts and on the applicable legal standard applied.

In *Cotton Belt*, the Tenth Circuit was faced with a carrier's contracting out of work for the first time in more than thirty years. The Court first concluded that contracting out during the emergency conditions of World War II was too remote and dissimilar to the present conditions to give the carrier the right to contract out again. The Court then turned its attention to the parties' agreement and construed the scope clause as implicitly assuring that the carrier's signal work would be performed exclusively by the union's members. The Court further concluded that the carrier's several, unsuccessful attempts to negotiate a clause permitting contracting out was an admission that the agreement as written did not permit contracting out. Hence, a major dispute existed.

The Tenth Circuit's analysis is devoid of the standard used in the First Circuit to define major and minor disputes; *viz.*, whether the carrier's defense is "frivolous" or

"obviously insubstantial." *Airline Stewards; Carbone v. Meserve.* Apparently, in assessing the validity of past practice, in interpreting contract provisions and in applying the "obviously insubstantial" standard, the Tenth Circuit applies a different test to major v. minor disputes than the First Circuit.[2] The fact that the Tenth Circuit has not adopted this standard does not result in a direct conflict between the case at bar and *Cotton Belt.* Significantly, Petitioners are not challenging the First Circuit's use of the "obviously insubstantial" standard, only the result reached.

Such differences as to the applicable standard aside, *Cotton Belt* is also distinguishable on its facts. First, *Cotton Belt* involved the contracting out of work on property which remained in the control, and under the responsibility, of the carrier. The Tenth Circuit, interpreting both the contract and the Railway Labor Act, asserted numerous times that the carrier's work was being performed by non-employees. Of course, in the case at bar, the dispute involves track leased to, and under the responsibility of, another party. The lessee is doing its own work on the leased track, not the work of MeC. This distinction between contracting out and leasing property is significant and is ignored by Petitioners.

Second, the Tenth Circuit noted that the carrier attempted unsuccessfully several times to negotiate a provision in the agreement allowing contracting out; thus, it was proper to conclude that the agreement did not permit contracting out. By distinct contrast, it is the UTU here which has attempted to amend the parties' agreement by serving a Section 6 Notice proposing an amendment to the

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[2]As Petitioners admit in footnote 3 of their Petition, only the Tenth Circuit has failed to adopt the "obviously insubstantial" standard.

labor contract prohibiting MeC from leasing or selling track without guaranteeing that current MeC employees will keep their jobs on the leased or sold track. If the Tenth Circuit's reasoning applied here, it would be proper to conclude that the agreement now permits MeC to do exactly what the UTU attempts to prohibit by Section 6 Notice; *viz.*, leasing track where the lessee assumes responsibility for train operations on the leased track.

Thus, both on the law and on the facts, the differences between the case at bar and *Cotton Belt* may signify two identifiable approaches, but do not present a direct conflict as asserted by the UTU.

IV. The Court Of Appeals' Decision Is Not In Conflict With The Second Circuit's Decision In *Local 553, Transport Workers Union of America v. Eastern Airlines, Inc.*

Finally, Petitioners argue that certiorari should be granted because the Court of Appeals' decision is in conflict with the Second Circuit's decision in *Local 553, Transport Workers Union of America v. Eastern Air Lines, Inc.*, 675 F.2d 668 (2d Cir. 1983). Petitioners argue that the conflict arises due to the failure of the First Circuit to "recognize that in making the 'major/minor dispute' determination, a court must focus on the extent of the disruption likely to be caused by the carrier action." Petition at page 5.

In the first instance, the Second Circuit discussed use of an "extent of disruption" standard only in *dictum*. In fact, the Second Circuit affirmed the District Court's finding of a major dispute on the ground that the pertinent

contract language did not give the carrier even an "arguable" defense. As a result, there is no genuine conflict between *Local 553* and the case at bar.

Furthermore, to the extent that *Local 553* suggests that a court focus on such a factor in making the major/minor dispute determination, it is distinguishable from the present case since that is not part of the test applied by the First Circuit. Indeed, if any decision is out of the mainstream of decisional law in this area it is *Local 553*. No other case addressing this issue has established this additional factor. *See e.g., Airline Stewards; Carbone v. Meserve; United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542 (3d Cir. 1974); *United Transportation Union v. Baker*, 482 F.2d 228 (6th Cir. 1973).

Again, it is significant to note that Petitioners have not challenged the First Circuit's use of the "obviously insubstantial" standard, but only the result; thus, the issue of whether the First Circuit should require the additional factor suggested by the Second Circuit is not even before this Court.

V. The Question Presented Does Not Warrant Review By This Court

The sole question presented by the Petitioners is whether the Court of Appeals correctly held that MeC's defense to an alleged contract violation, based on a single past practice, is not "obviously insubstantial" or "frivolous." It is clear that this decision is of limited application. Petitioners only challenge the application of the legal standard to the unique facts in this case. No sweeping principle of law is in question, since the case turns on its particular facts.

Indeed, if this Court were to find that a single instance of past practice cannot support MeC's argument, this Court would likely remand the case for a decision on whether the LaMoille Valley transaction (and the Woodland transaction) supplies an additional instance of past practice which would be further evidence supporting MeC's argument. In its opinion, the Court of Appeals states:

> It is perhaps arguable that the LaMoille Valley ICC matter is not so readily disposed of, since the Union there voiced no objection. As against this, however, it would seem arguable that the union's acquiescence was not in recognition of the contract, but because of satisfaction with the so-called Mendocino Coast employee protection conditions [citation omitted]. We need not resolve this question, however. The Carter Milling matter was free of any strings.

Petitioners' Appendix at 6b.

Furthermore, the Court of Appeals did not consider MeC's initial contention that, because the contract was silent, its actions were permitted as an exercise of management prerogative. Thus, it is clear that the situation presented before this Court will be resolved not upon legal issues of national importance, but upon factual conclusions related only to these specific circumstances.

CONCLUSION

For all the foregoing reasons, Respondents Maine Central Railroad Company, Portland Terminal Company and Guilford Transportation Industries, Inc. respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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